NO. 45348-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DERON ANTHONY PARKS, Petitioner

CLARK COUNTY SUPERIOR COURT CAUSE NO. 10-1-01215-0

SUPPLEMENTAL RESPONSE TO PERSONAL RESTRAINT PETITION

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The State submits this Supplemental Brief of Respondent upon this Court's order following a reference hearing held in Clark County Superior Court on the issue of whether Parks received effective assistance of counsel.

SUPPLEMENTAL STATEMENT OF THE CASE

The State previously summarized the evidence presented at trial in its original Response to Personal Restraint Petition. In addition to those facts, the State presents the following:

After trial, Parks filed a direct appeal with this Court. This Court affirmed the conviction and denied Parks's SAG argument that he received ineffective assistance of trial counsel for his attorney's failure to call exculpatory witnesses. CP 46-56. Four months after the mandate issued, Parks filed this Personal Restraint Petition alleging ineffective assistance of counsel, and submitted affidavits of three witnesses, as well as his own, to support his claim. *See* Petition. On July 15, 2014, this Court denied Parks's petition. Parks then filed a Motion for Discretionary Review with the Supreme Court. The Supreme Court remanded the matter to this Court to have this Court order the Superior Court to hold a reference hearing and then further consider the merits of Parks's ineffective assistance of counsel claim. *In re Parks*, 349 P.3d 819 (Mem),

820 (2015). This Court then remanded the matter to Clark County Superior Court to answer the following questions:

> (1) What testimony James Lee Hettrick, Kristofer James Bay, and Richard Rolph would have provided if they had testified;
> (2) Whether Petitioner asked his counsel to contact these individuals;
> (3) Whether these individuals attempted to contact counsel;
> (4) Whether counsel had any legitimate tactical reasons for not presenting these individuals as witnesses; and
> (5) Any other factual issue bearing on counsel's alleged failure to interview these witnesses.

CP 61-62.

The Superior Court heard testimony from many witnesses, including Mr. Hettrick, Mr. Bay, Mr. Rolph, Parks, trial counsel, and the investigator hired by trial counsel. RH[1] 1-133. The Superior Court entered "findings" that summarized the testimony of the witnesses, but made no credibility determinations and did not resolve any disputed issues of fact.

In regards to the first question, the Superior Court received testimony that Mr. Hettrick would have testified that on an evening in December 2008 he was at Tyler's (also referred to as "T") house on an occasion when Parks was there and cooked dinner; on this occasion the victim, C.T. was present as was Mr. Bay. CP 81. On this occasion, Mr. Hettrick and Mr. Bay gave Parks a ride to a bar around 10 or 10:30p.m. *Id.*

[1] For ease of reference, the State cites to the record below as Petitioner did in his Supplemental Brief. RH refers to the verbatim report of proceedings of the reference hearings held on September 23, 2015 and October 23, 2015. RP refers to the verbatim report of proceedings of the trial.

The teenagers dropped 40 year old Parks off at the bar and then went to their separate homes for the remainder of the night. *Id.* Mr. Hettrick indicated he does not know what day the rape occurred and could not testify if the night he gave Parks a ride home was the same night C.T. was raped. CP 82. Mr. Hettrick observed C.T. in Parks's presence after December 2008. CP 81. Mr. Hettrick had previously written a statement concerning what he knew of the case and indicated in that statement that he heard C.T. say he would claim Parks raped him if Parks reported C.T.'s involvement in a burglary of Parks's home. *Id.* Mr. Hettrick never contacted or attempted to contact Parks's defense counsel or police; Mr. Hettrick was never contacted by Parks's defense counsel or police. *Id.*

Mr. Bay would have testified that he saw C.T. at a party at Tyler's house in 2008; Mr. Hettrick and Parks attended, and Parks cooked dinner. CP 82. Mr. Bay and Mr. Hettrick left the party at approximately 10 or 10:30p.m. and drove Parks to a bar and dropped him off. *Id.* Mr. Bay then went home and did not see Parks for the remainder of the night. *Id.* Mr. Bay was never contacted by police or defense counsel, and he never made any attempts to contact police or defense counsel. *Id.* Mr. Bay recalls he was asked to provide a written statement on this case a few years ago, but he does not recall by whom or under what circumstances. *Id.* Mr. Bay did

discuss his written statement with Mr. Hettrick prior to writing it and the two did discuss what to write in their statements. CP 83.

Richard Rolph testified that he was familiar with the parties involved in this case, and recalls going to a skate park with Parks multiple times during the time period involved in this case. CP 83. Mr. Rolph saw C.T. at the skate park multiple times after December 2008 and did not observe any animosity between Parks and C.T. *Id.* Mr. Rolph indicated one time C.T. and a couple others were at the skate park and he saw Parks confront the boys about burglarizing his home. *Id.* The group of boys told Parks they would make him "pay" if he told police. *Id.* Mr. Rolph was never contacted by police or defense counsel and never made any attempts to contact police or defense counsel. *Id.* Mr. Rolph did provide a written statement about his knowledge of the case, but did not include anything about witnessing C.T. and other boys threaten to make Parks "pay" if he went to police about the burglary. CP 84.

With regard to the second question, the Superior Court summarized defense counsel, now Judge Suzan Clark's, testimony and Parks's testimony on the issue. Judge Clark recalls that Parks provided her with the names and phone numbers of potential witnesses, and remembers those included Mr. Bay and Mr. Hettrick. CP 84-85. Judge Clark testified she does not recall Parks giving her the name of Richard Rolph and his

name is not included in her records. *Id.* Parks testified he gave Judge Clark the names of Mr. Bay, Mr. Hettrick and Mr. Rolph, along with their phone numbers, and indicated that Mr. Hettrick and Mr. Bay left the party with him earlier in the evening, and that Mr. Rolph witnessed C.T. and the other boys threaten him. CP 85.

With regard to the third question, all relevant witnesses testified they never attempted to contact Parks's defense counsel. CP 86.

With regard to the fourth question, the Superior Court did not provide an answer in its findings, but only summarized the testimony of Judge Clark. The trial court's findings indicate that Judge Clark asked her investigator to contact the witnesses that Parks provided, but that he had difficulties getting a hold of them. CP 86-87. Judge Clark herself attempted to contact the witnesses, but did not meet success. CP 87. When Judge Clark was unable to contact Mr. Bay or Mr. Hettrick she asked Parks for additional contact information. *Id.* After discussing the case with Parks, Judge Clark understood that Parks was at Tyler's house for the entire night, and she was never informed by Parks that he had an "alibi" in that he left the party between 10 and 10:30p.m. with Mr. Bay and Mr. Hettrick. *Id.* Parks was aware of who Judge Clark intended to call at trial, and that Mr. Bay, Mr. Hettrick, and Mr. Rolph were not on his witness list. CP 88. Judge Clark testified that Parks was insistent on going to trial on

the first trial setting and did not want to continue the trial as he believed the State would be unable to locate the victim, C.T., for trial. CP 87. Parks wanted to go to trial at the first trial setting for "tactical" reasons. CP 88. This evidence shows a legitimate tactical reason for proceeding to trial quickly without having secured other witnesses for trial.

With regard to the fifth question, the Superior Court again summarized the testimony of the witnesses. The investigator that Judge Clark hired was Gary Rice. CP 88. He keeps records on his cases, including billing statements and notes. *Id.* Mr. Rice had no memory of this particular case or any of the work he did on this case. *Id.* Mr. Rice's billing statement does not indicate he attempted to locate any witnesses at Judge Clark's request. *Id.* Mr. Rice's billing statement does contain vague references to sending emails and making phone calls, and Mr. Rice was unable to indicate who he called or emailed. *Id.* Mr. Rice's practice is to document the work he performs in his cases, and he has no notations in his file that he was asked to contact witnesses. *Id.*

Judge Clark testified this was a memorable case as it was "unusual." CP 92. Judge Clark feels her memory of this case is "pretty strong." She remembers meeting with Parks in the jail and asking him for names of witnesses. *Id.* Parks gave her the names of Mr. Bay and Mr. Hettrick, along with some others. *Id.* Judge Clark does not remember

Parks providing her with the name of Mr. Rolph. *Id.* Judge Clark asked her investigator, Mr. Rice, to attempt to contact witnesses in this case, but he had difficulties getting a hold of them. CP 93. Judge Clark tried to contact them herself, but was not able to contact Mr. Bay or Mr. Hettrick. *Id.* Judge Clark is "100% sure" that Parks did not tell her that on the night of the rape he left Tyler's house with Mr. Bay and Mr. Hettrick at 10:30p.m. *Id.* Judge Clark is adamant that had Parks told her he had an "alibi" that she would have used the alibi witnesses if she found them to be credible. *Id.* Parks told Judge Clark that the rape accusation was retaliatory for Parks pursuing a burglary charge against the victim. *Id.* Parks was adamant that the case proceed to trial at the first trial setting because he believed the victim would not appear for trial; he was aware that Mr. Bay, Mr. Hettrick and Mr. Rolph were not on their witness list and never expressed any concern about their exclusion. CP 94. Parks wanted to proceed to trial for "tactical" reasons because he felt the State would not locate C.T. for trial. *Id.*

Parks testified that he provided Judge Clark the names of the three witnesses and told him what each would testify to. CP 89. Parks testified he told Judge Clark he left the party at 10:30p.m. with Mr. Bay and Mr. Hettrick and went to a bar. CP 90. Parks also testified he told Judge Clark that Mr. Rolph was present when C.T. and the other boys threatened him

at the skate park. *Id.* Parks was unable to contact any of these witnesses prior to trial. *Id.* Parks testified he was unaware that his attorney did not plan to call these witnesses at trial. *Id.* Parks testified he asked each of these three witnesses to provide a written statement for his personal restraint petition, which they did in 2013, years after his trial. *Id.* Parks then submitted those statements with his personal restraint petition.

SUPPLEMENTAL ARGUMENT

I. Parks's Petition Should Be Dismissed As He Has Not Shown He Was Denied Effective Assistance of Counsel.

Parks claims he was denied effective assistance of counsel because his attorney failed to interview three potential witnesses, and failed to investigate his alibi defense. Parks has not sustained his burden of showing that he did in fact provide counsel with the potential alibi defense, that the testimony of these witnesses would have changed the outcome of the trial, or that his and his attorney's decision to go forward to trial without these witnesses was not a legitimate trial strategy. Parks's petition should be dismissed.

The U.S. and the Washington State Constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. article I, § 22. A defendant who claims ineffective assistance of counsel must show deficient performance and

resulting prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove "deficient" performance, the defendant must show that counsel's performance fell "below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. "There is a strong presumption that counsel's performance was reasonable." *State v. Kyllo,* 166 Wash.2d 856, 862, 215 P.3d 177 (2009). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo,* 166 Wash.2d at 863, 215 P.3d 177. To satisfy the prejudice prong, the defendant must show that the outcome of the proceedings would have differed but for counsel's deficient performance. *State v. Grier,* 171 Wash.2d 17, 33, 246 P.3d 1260 (2011), *on remand,* 168 Wash.App. 635, 278 P.3d 225 (2012). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052.

Generally the decision whether to call a witness or present a particular defense is a tactical decision and cannot be the basis of an ineffective assistance of counsel claim. *Grier*, 171 Wn.2d at 33. However, if a defendant shows his counsel's choice was not a legitimate tactical decision, he can obtain relief if he also shows prejudice. On review, this Court strongly presumes that trial counsel exercised reasonable professional judgment and will not find ineffective assistance of counsel if

counsel's actions can be characterized as trial strategy or tactics. *State v. Barrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994); *State v. Rec*, 105 Wn.App. 62, 66, 18 P.3d 615 (2001), *rev. denied*, 145 Wn.2d 1036 (2002). Parks has not shown that trial counsel was aware of a potential alibi defense, that she unreasonably failed to investigate, that proceeding quickly to trial without witnesses secured was an unreasonable decision, or that any of these allegations prejudiced him.

Importantly, the testimony of Mr. Bay, Mr. Hettrick, and Mr. Rolph cannot be reconciled with Parks's testimony at trial, and therefore should be disregarded as recent fabrications or taken as evidence of Parks giving perjured testimony at trial. At trial, Parks testified about the night of a party at Tyler's house, presumably discussing the night C.T. was raped. RP 102-18. Parks never mentions the presence of Mr. Bay or Mr. Hettrick at Tyler's house, and never mentioned that he left with them. RP 111-12. If indeed Mr. Bay or Mr. Hettrick gave Parks a ride away from Tyler's house that evening, Parks would have so testified. Given what Judge Clark testified to at the reference hearing—that Parks never told her that anyone gave him a ride away from Tyler's house, or that he had an alibi for that night—coupled with Parks's testimony at trial, the reasonable conclusion is that either the two "alibi" witnesses fabricated their testimony, or they are remembering a different night, as it was testified

that these same parties all "hung out" together on many occasions in this time period. Parks also never mentioned at trial the presence of Mr. Rolph or Mr. Hettrick at the skate park when C.T. and the others allegedly threatened Parks. RP 102-112. Presumably if they had gone with him to the park to confront C.T., he would have so indicated during his testimony. Mr. Rolph's testimony would have also only harmed Parks's case as Mr. Rolph's testimony appears to be fabricated on this issue. Parks fails to mention Mr. Rolph's presence at the skate park during his own trial testimony, and Mr. Rolph completely failed to mention this alleged interaction in his written statement for Parks's petition. Nowhere in his written statement does Mr. Rolph indicate he heard C.T. or one of the boys C.T. was with threaten Parks. That this would be an oversight, or something Mr. Rolph forgot to include defies common sense. Easily the most important part of Mr. Rolph's knowledge about this case, no juror would believe he would forget to include it in his statement if it were true.

Furthermore, Mr. Bay and Mr. Hettrick, even if their testimony is taken as true, do not establish an alibi defense for Parks. They both testified that they took Parks to a bar near 10:30p.m., dropped him off, and then went home for the rest of the night. CP 81-82. Neither person saw Parks again that night. *Id.* At trial, C.T. testified he did not even arrive at Tyler's house until after 10p.m., and likely later. RP 66-67. And even Mr.

Bay and Mr Hettrick don't place C.T. at Tyler's house until 9:30p.m. CP 81. C.T. testified at trial that he was there for awhile, had time to drink six or more beers, before passing out and at some unknown time later waking up to Parks raping him. RP 70-72. Under the only version of the rape presented, Mr. Bay and Mr. Hettrick placing Parks at a bar at 10:30p.m. does not in any way establish an alibi for Parks. The testimony of these two witnesses would have easily been discounted by the jury because of the ease with which Parks could have returned to Tyler's residence after the two witnesses left him at the bar. Parks himself testified at trial that he went to a bar and then home, never mentioning being in the presence of another person, never indicating a potential alibi. This testimony is neutral at best because it does not provide Parks with an alibi for the relevant time period, when the rape actually occurred. Furthermore, the witnesses lack credibility in that their statements were only ever made after Parks was convicted, at his request, and after consulting each other on what to write. Their testimony is insignificant, and would not have changed the outcome of the trial.

Also, Judge Suzan Clark testified that Parks never told her that there were any witnesses to his leaving Tyler's house that evening. She testified that had she been told that these witnesses could establish an alibi that she would have thoroughly investigated and presented them as

witnesses if they were credible. CP 87. Judge Clark had no reason not to pursue an alibi defense if she had been aware of the possibility. She is a very experienced and successful trial attorney, now judge. The best evidence, the most credible evidence, presented on this issue shows that Parks did not indicate to Judge Clark that he had an alibi for the night of the rape.

Even if the testimony of the new witnesses for Parks are taken as true, they do not demonstrate ineffective assistance of counsel as there was clearly a legitimate trial tactic for proceeding quickly to trial, despite the fact that no witnesses had returned Judge Clark's phone calls and that she had not secured the potential witnesses for trial. On review, an appellate court "must resist the temptation to substitute [its] own personal judgment for that of [the defendant's] attorney because 'it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'" *State v. Carson*, 184 Wn.2d 207, 220, 357 P.3d 1064 (2015) (quoting *Strickland*, 466 U.S. at 689). A defense attorney's performance is sufficient as long as her decisions can be "characterized as legitimate trial strategy or tactics." *Kyllo*, 166 Wn.2d at 863.

Many different decisions about trial are legitimate trial strategy or tactics. It can be tactical to not interview a witness if defense counsel has

good reason to believe the witness would do better for his client to be surprised by counsel's difficult or probing questions in front of the jury. *See In re Matter of Pirtle,* 136 Wn.2d 467, 488, 965 P.2d 593 (1998). When a witness will present poorly to the jury, it is a legitimate strategy to choose not to call such a witness if the witness would harm the defendant's chances. It is also a legitimate trial strategy to not investigate potential jury prejudice in favor of keeping the seated jury intact, on the hope of a hung jury or acquittal. *Government of Virgin Islands v. Weatherwax,* 77 F.3d 1425 (3d Cir. 1996). An "all or nothing" approach in deciding not to request lesser included jury instructions is also a legitimate trial tactic. *State v. Hassan*, 151 Wn.App. 209, 218, 211 P.3d 441 (2009). Likewise, choosing to push the State to a fast trial, because you have good reason to believe the victim will not appear for trial, is a legitimate trial strategy.

Here, Parks insisted on going to trial when first set, even though no other witnesses were secured for trial. This decision on his part, and on defense counsel's part to go along with Parks's choice, was strategic and reasonable. The State's entire case rested on the testimony of C.T. If C.T. did not appear for trial, the State would have no substantive evidence of the crime and would not have been able to proceed. Defense counsel knew C.T. was in treatment on the other side of the State, and she and Parks

doubted the State's ability to procure his presence at such a quick trial setting. CP 87. Pushing the State to a quick trial on the reasonable belief that there is a good chance of securing a dismissal because of that action is a legitimate trial strategy. It is similar to the "all or nothing" approach—a risk, but the potential for a great reward if successful. A defendant who makes a tactical choice hoping for some advantage "may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right." *State v. Armstrong*, 69 Wn.App 430, 435, 848 P.2d 1322 (1993) (quoting *State v. Lewis*, 15 Wn.App. 172, 177, 548 P.2d 587 (1976)). Parks tactically pushed the case to trial without his attorney having successfully made contact with some witnesses. Parks knew this, yet wanted to proceed to trial because he believed the victim would not show up to testify. Parks created the situation he now complains of.

Part of the inquiry on an "all or nothing" tactical decision is whether the defendant was aware of the risks. *Hassan*, 151 Wn.App. at 220. It is clear from our record that Parks was involved in his defense and had strong reasons to believe that the State would be unable to procure C.T. for trial. Judge Clark testified that he was well aware that she did not have Mr. Hettrick, Mr. Bay or Mr. Rolph on the witness list, yet he was insistent on going to trial because of the believed likelihood the State

would not have the victim for trial. Parks and Judge Clark made a tactical decision at the time that was legitimate and reasonable; it simply did not pay off. Parks "cannot have it both ways; having decided to follow one course at the trial, [he] cannot on appeal now change [his] course and complain that [his] gamble did not pay off." *State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991). Parks's gamble did not pay off, but that does not equate ineffective assistance of counsel.

Parks's trial testimony shows the truth of his defense at the time of trial, and this lines up with Judge Clark's testimony at the reference hearing. Parks did not have an alibi defense, and he never presented such a defense to his attorney as an option. But even if he had, it was legitimate tactical decision to proceed to trial with the hope that the victim would not show up for trial and the State would be forced to dismiss. Parks also could not establish prejudice as the testimony of the witnesses would not have affected the outcome of the trial.

II. The State is Entitled to Costs if it Substantially Prevails in a Personal Restraint Petition

Parks argues under *State v. Sinclair*, 192 Wn.App. 380, 367 P.3d 612 (2016) that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is indigent. The State intends to file a cost bill if the State substantially prevails for statutory

attorney fees of $200 and the cost of preparing the brief in response at a cost of $2.00 per page.

A personal restraint petition is a civil action. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999); *In re Bailey*, 162 Wn.App. 215, 252 P.3d 924 (2011). A personal restraint petition should not be treated the same as a direct appeal for purposes of considering appellate costs. Even if attorney fees are not authorized by contract, statute, or equity, statutory attorney fees are allowed as costs for the substantially prevailing party of a civil action. *Bailey*, 162 Wn.App. at 221 (citing to RAP 14.2, RAP 14.3(a), and *Hudson v. Hapner*, 170 Wn.2d 22, 34-35, 239 P.3d 579 (2010)). In *Bailey, supra*, the Court found the State, who prevailed in a personal restraint petition, was "entitled to statutory attorney fees in its award of costs under RAP 14.3(a)." *Bailey*, 162 Wn.App. at 221.

RAP 14.3(a) allows a party to recoup reasonably necessary costs for preparing the brief "as provided in rule 14.3(b)." RAP 14.3(b) provides that the amount awarded per page is set by the Supreme Court, currently set at $2.00 per page. The State is entitled to these costs if it prevails as a prevailing party in a civil action.

Sinclair, supra dealt with recoupment of appellate costs on a direct appeal. Unlike a direct appeal, personal restraint petitions are civil matters,

and thus the analysis of whether to award costs to a substantially prevailing party should differ. The analysis for whether to award fees in a civil matter focuses on whether the party seeking fees is seeking a reasonable amount. *Mahler v. Szuchs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Once the State submits a cost bill in this matter, if the State submits a cost bill, then at that time this Court could determine whether the requested amount is reasonable under the circumstances of this case.

CONCLUSION

Parks has failed to show that he informed Judge Clark of a potential alibi defense, that she failed to make reasonable efforts to contact witnesses, and that the decision to proceed to trial prior to securing witnesses to testify was not a legitimate trial strategy. Parks has failed to meet his burden and his petition should be dismissed.

DATED this 20th day of July 2016.

Respectfully submitted:

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